

*PTRF et al. v. DENR DWQ and
PCS Phosphate Company, Inc.*
09 EHR 1839

PCS Phosphate Company, Inc.
Presentation to Environmental
Management Commission
September 13, 2012

OVERVIEW

- 401 Certification
- Standard of review
- Petitioners' claims :
 - Reasonable Assurance
 - Buffers
 - NHP / Rule 506(e)
 - Alternatives Analysis
 - Notice

401 Certification

Legal Framework

- Clean Water Act prohibits “the discharge of any pollutant by any person” into “waters of the United States” unless authorized by federal permit. 33 U.S.C. 1311(a).
- CWA Section 404 Federal Permit may only be granted after issuance of CWA Section 401 “certification from the State in which the discharge originates.” 33 U.S.C. 1341(a)(1).

401 Certification Legal Framework

- 401 Certification must set out limitations and monitoring requirements to assure compliance with applicable CWA requirements and with “any other appropriate requirement of State law...” 33 U.S.C. 1341(d).
- North Carolina – DWQ is authorized to issue 401 Certification in accord with EMC rules set forth at 15A NCAC 2H.0501 *et seq.*

401 Certification

- Limitations, Terms, and Conditions.
- Additional documents and materials incorporated by reference.
- Issued by DWQ after extensive environmental impact analyses (DEIS, SDEIS, FEIS) over 9-year period – involving Army Corps, DWQ, numerous federal and state agencies, PCS, and Petitioners.

Burden of Proof and Standard of Review

- EMC Review of ALJ Decision.
 - Adopt unless “clearly contrary to the preponderance of admissible evidence.” N.C. Gen. Stat. 150B-36(b3)
- Summary Judgment Standard.
 - No genuine issue of material fact and a party is entitled to judgment as a matter of law.

Burden of Proof and Standard of Review

- Petitioners' Burden
 - To establish by a preponderance of the evidence DWQ has acted arbitrarily or capriciously or otherwise unlawfully.

[N.C. Gen. Stat. 150B-23(a)]

- Deference to DWQ interpretation.

[N.C. Gen. Stat. 150B-34(a); *County of Durham v. N.C. DENR*, 131 N.C. App. 395, 396-97 (1998)]

- Presumption DWQ acted properly.

[*Adams v. N.C. Bd. Of Reg. for Prof. Eng'rs*, 129 N.C. App. 292, 297 (1998)]

Burden of Proof and Standard of Review

- On summary judgment:
 - PCS and DWQ submitted evidence establishing Petitioners could not show DWQ acted arbitrarily, capriciously, or illegally.
 - Rebuttable presumption in favor of DWQ.
 - Petitioners' burden to submit evidence to overcome presumption and show genuine issue of material fact that DWQ acted unlawfully. [*Dobson v. Harris*, 352 N.C. 77 (2000)]

Reasonable Assurance

The 401 Certification contains DWQ's "reasonable assurance" that water quality standards will not be violated.

- Petitioners claim:

(1) DWQ did not actually make the reasonable assurance determination; and

(2) Instead, the 401 Certification unlawfully relies on monitoring and modification conditions.

Reasonable Assurance

Documentary evidence developed with DWQ's participation over a 9-year period was before DWQ when it made its decision to issue the 401 - DEIS, SDEIS, FEIS, PCS application/attachments, Entrix study, and additional info submitted by PCS.

- The record shows indisputably that DWQ carefully reviewed and evaluated the water quality concerns raised by Petitioners.

Reasonable Assurance

Petitioners ignore PCS's mitigation.

- Restoration of 7,968 acres of wetlands (vs. 3,927 acres impacted) and 44,043 linear ft of streams (vs. 22,435 linear ft impacted)
- Enhancement of 756 acres of wetlands and 7,994 linear ft of streams
- Preservation of 2,472 acres of wetlands and 32,851 linear ft of streams

[Corps Record of Decision pp. 2, 9, 17-26, Smith 2d Aff., Ex. 8.]

Reasonable Assurance

Petitioners point to “significant concerns” raised by agencies and by Petitioners about potential water quality impacts of the project, claiming such “concerns” are sufficient to raise a genuine issue of material fact. [Pet. Br. p. 74.]

- But Petitioners cannot raise a genuine issue of material fact on that issue simply by asserting there is evidence in the record that runs counter to DWQ’s decision.

Reasonable Assurance

- Instead, Petitioners must present evidence that DWQ acted arbitrarily in evaluating evidence.
- The record evidence shows DWQ did its job in weighing the concerns, evaluating them, determining their validity, and either dismissing them or addressing them in the 401 Certification terms and conditions.
 - The Corps reached the same conclusions.

Reasonable Assurance

Petitioners are also wrong in arguing that DWQ relied only on monitoring.

- (1) 401 Certification imposes substantive limitations and conditions to protect water quality.
- (2) 401 Certification monitoring and modification conditions (5, 12, 13), are similar to those approved as a matter of law on summary judgment by the North Carolina Court of Appeals in the *Deep River* case.

Continuing Compliance:

5. PCS Phosphate Company, Inc. shall conduct construction activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act), the 401 Water Quality Certification rules (15A NCAC 2H .0500) and any other appropriate requirements of State law and federal law. If the Division determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the Division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H .0507(d). Before modifying the Certification, the Division shall notify PCS Phosphate Company, Inc. and the US Army Corps of Engineers, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions shall be provided to PCS Phosphate Company, Inc. in writing, shall be provided to the United States Army Corps of Engineers for reference in any Permit issued pursuant to Section 404 of the Clean Water Act, and shall also become conditions of the 404 Permit for the project. This condition is intended to conform with the provisions of 15A NCAC 2H .0507 (d).

Monitoring

12. Groundwater monitoring – Additional written approval is required from DWQ for a final groundwater monitoring plan that supplements and compliments the existing groundwater monitoring that is being conducted by PCS for various state and federal agencies. In addition to other parameters subject to groundwater standards, cadmium and fluoride shall be monitored in the final groundwater monitoring plan. This plan shall include groundwater monitoring of the protected portion of the Bonnerton Road Non-Riverine Wet Hardwood Forest as noted in condition 9 above in order to ensure that the existing hydrology of this site is maintained. This monitoring shall focus on the "58A" area of the Bonnerton Road Non-Riverine Wet Hardwood Forest to ensure that its groundwater hydrology is maintained.
13. Stream and watershed monitoring – The existing water management and stream monitoring plan for water quality, water quantity and biology (macroinvertebrates and fish) shall be continued for the life of the Permit by the applicant. Additional monitoring shall be proposed by the applicant and approved by DWQ for tributaries in the Bonnerton and South of 33 tracts before land clearing or impacts occur to those locations. This additional monitoring plan shall collect data from a representative number of streams in each tract and be designed to assure the protection of downstream water quality standards including Primary and Secondary Nursery Area functions in tributaries to South Creek, Porter Creek, Durham Creek and the Pamlico River adjacent to the mine site. Monitoring locations shall include the upper end of Porter Creek in the "58A" portion of the Bonnerton Road Non-Riverine Wet Hardwood Forest in order to ensure that hydrology of this wet hardwood forest is maintained.

The plan shall identify any deleterious effects to riparian wetland functions including by not

As further found by the EMC, at the time the Director of the Division of Water Quality issued the 401 Certification, he was aware of the potential for water quality standard violations and “specifically considered the existing Randleman Lake Water Supply Watershed Nutrient Management Strategy and the opportunity that the State would have to impose additional restrictions on nutrient sources in the event of actual or threatened water quality standard violations after the reservoir is constructed.”

Deep River Coalition, Inc., et al. v. North Carolina Department of Environment and Natural Resources, 165 N.C.App. 206, 213, 598 S.E.2d 565, 569 (2004).

We agree with respondents that “no one will know precisely whether or to what extent exceedances [sic] of the Standard will occur until construction of the dam and impoundment of the lake have been completed” but that mere “[k]nowledge of the potential for exceedances [sic] of the chlorophyll *a* standard was not sufficient to preclude [DENR] from issuing the 401 Certification.” The trial court therefore had before it substantial and competent evidence that, in the event water quality standards were actually threatened, the State could impose additional restrictions to avoid chlorophyll *a* violations. We conclude the trial court did not err in concluding that DENR provided reasonable assurance that the State's water quality standards would not be violated by the proposed project.

Deep River Coalition, Inc., et al. v. North Carolina Department of Environment and Natural Resources, 165 N.C.App. 206, 213, 598 S.E.2d 565, 569 (2004).

Buffers

401 Certification Conditions

Condition 7:

- Mandates mitigation at DWQ-approved sites
- Prohibits later buffer impacts
 - No buffer impacts beyond 2014 impact area
 - Until DWQ approves additional mitigation

Condition 5:

- Reopener gives extra assurance for Buffer Rules

Buffers

Petitioners argue:

- 1) There is a practical alternative
- 2) The location of mitigation is improper
- 3) The mitigation amount is insufficient
- 4) There was no mitigation determination

Buffers

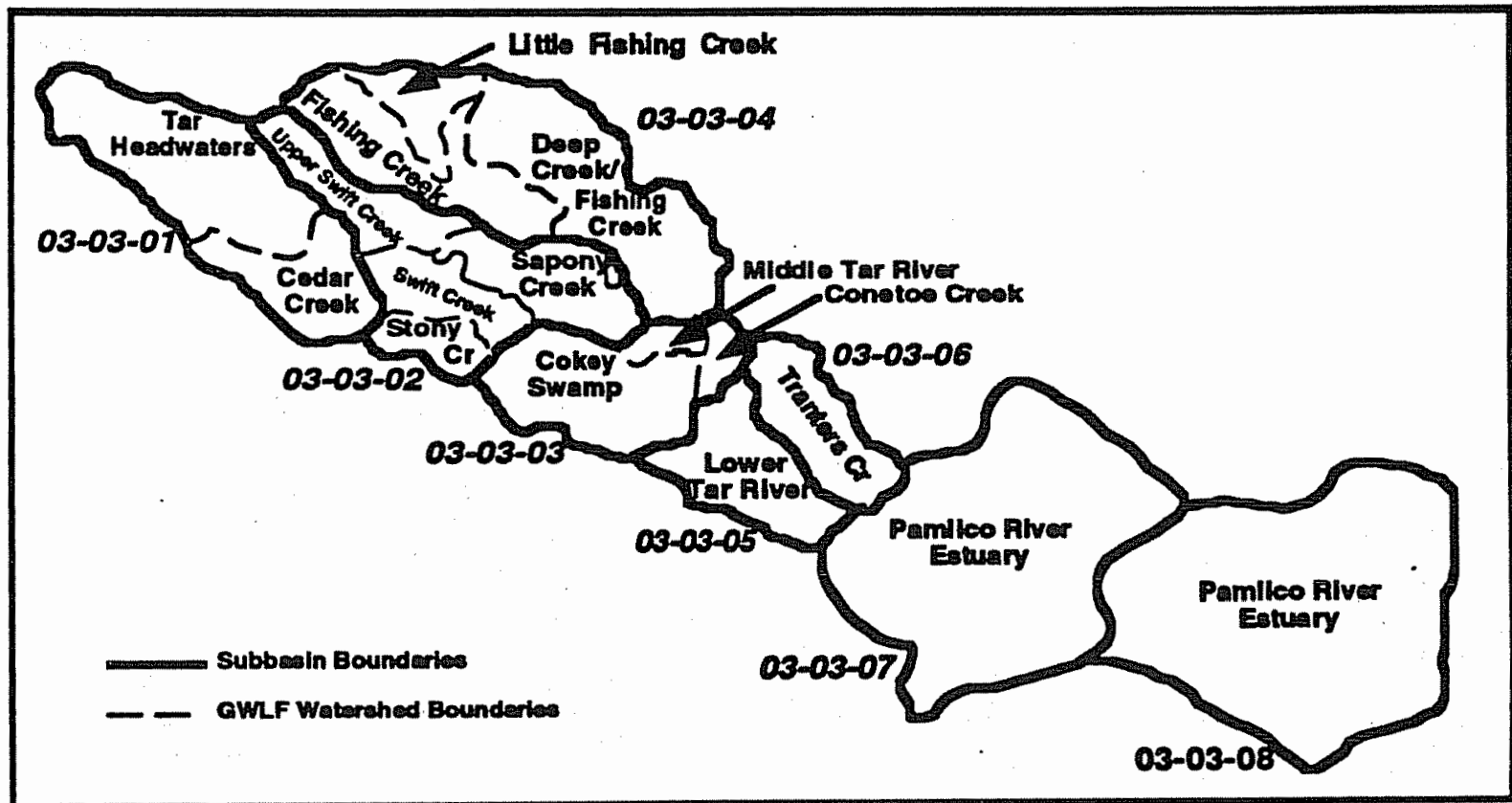
1) There is no practical alternative.

- DWQ/Corps studies show **smaller mine plan to reduce buffer impacts is not practical.**
- PCS acceptance of Condition 7 is not relevant to practicality determination.
 - Petitioners' argument is not logical.
 - Condition 7 only prohibits buffer impacts pending DWQ approval of additional mitigation.
 - DWQ properly concluded further reduction of buffer impacts is not practical [DWQ Memo]

Buffers

2) Buffer mitigation is properly located.

- Buffer Rules: restoration and enhancement must be as close to the Pamlico River estuary as impacts.
- Rulemaking history:
 - DWQ modeling guided adoption of Buffer Rules
 - Modeling defined “Pamlico River Estuary” as two former “sub-basins” that correspond to two 8-digit HUCs.

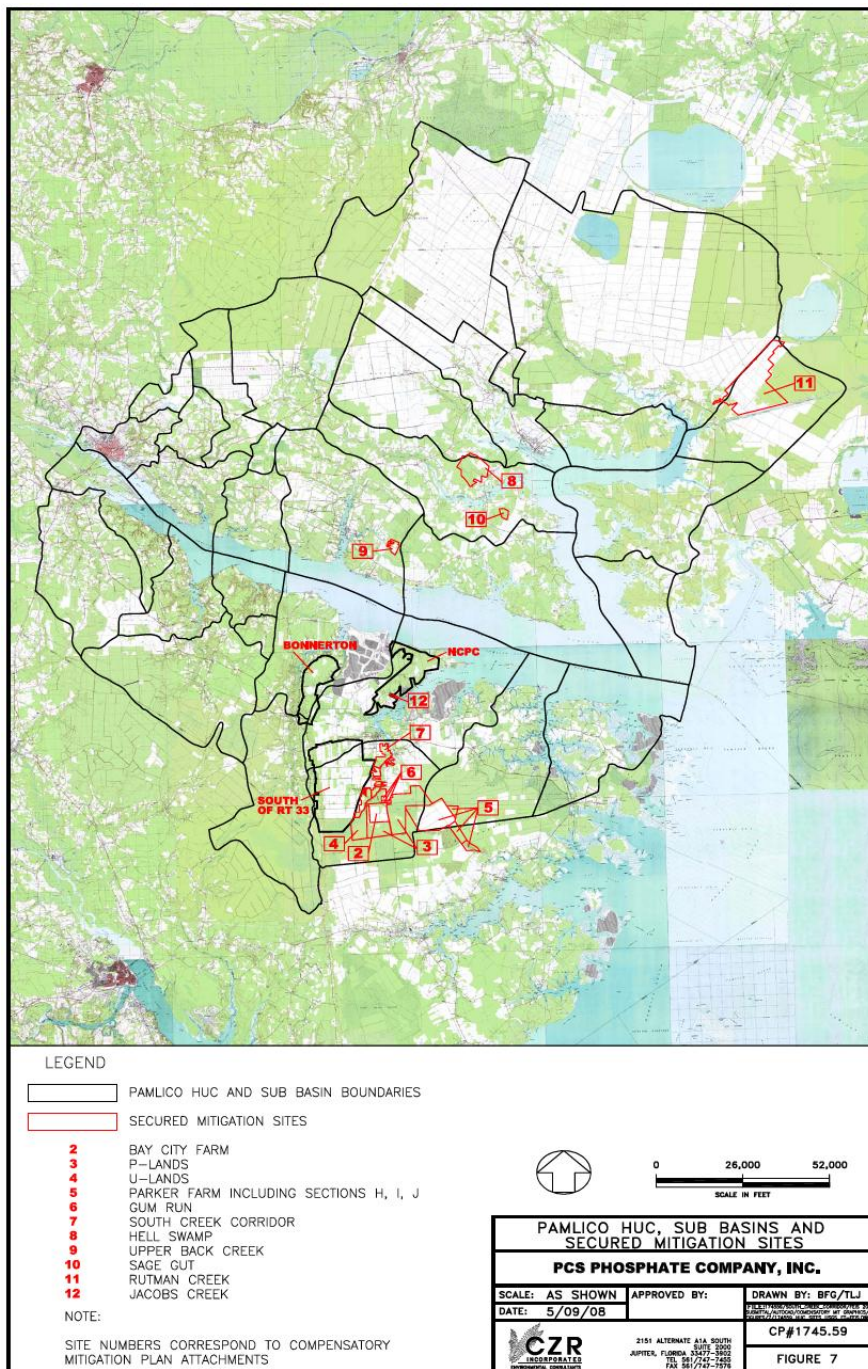


PCS buffer mitigation and buffer impacts are all located in one of the 2 HUCs that define the Pamlico River Estuary

1994 Tar-Pam Basin Plan Figure 3.4 at p.3-9

PCS buffer mitigation sites (8, 9, 10) are within the same 8-digit HUC as impacts.

This satisfies DWQ interpretation, which is more restrictive than EMC's rulemaking history.



Buffers

3) Buffer mitigation amount is sufficient.

Petitioners argue:

The amount of mitigation is insufficient because:

- Wetlands are subject to mitigation under the Buffer Rules
- 4:1 ratio applies

Buffers

Wetlands are not subject to mitigation under the Buffer Rules, but rather are mitigated under the *wetlands* rules.

- “wetlands subtracted out” before calculating mitigation
[DWQ Buffer Interpretation/Clarification # 2010-001]
- Wetlands “subject to mitigation under 15A NCAC 2H.0506”
[Buffer Rules at 2B.0259(3)]
- But even if wetland mitigation were required for *Buffer Rule* compliance, the mitigation required by the 401 Certification would be sufficient. [See PCS Br. pp. 28-31 and record cites]

Buffers

4:1 Ratio Does Not Apply

Petitioners argue that a 4:1 ratio must be used to determine *Buffers Rule* compliance, seeking to apply 15A NCAC 2H.0506(h)(7). But:

- 2H.0506(h)(7) is a *Wetlands Rule* and is inapplicable to *Buffers Rule* compliance.
- 2H.0506(h)(7) does not even apply a 4:1 ratio in these circumstances - “The above ratios do not apply to approved mitigation sites where the state and federal review agencies have approved credit/debit ratios.”

[*See also* 2H.0506(h)(1), (6) – Corps’ wetlands mitigation requirements sufficient]

Buffers

4) DWQ made mitigation determination.

Petitioners use misleading excerpt from DWQ staff deposition to argue no determination was made.

- “There’s not a document”

Buffers

The full statement is:

Q: And in the documents that you provided us, is there a document that, as this rule says, specifies the required area and location of the mitigation?

A: There's not a document. It's shown in each of the different mitigation sites. So each did a different mitigation plan, but there's not a document.

[Dorney Dep. p. 27 (emphasis added)]

Buffers

Mitigation Determination

Record evidence shows a determination was made:

- 401 Certification (incorporates PCS application and FEIS)
- DWQ memo Jan. 14, 2009 (references FEIS)
- FEIS Appendix I shows location and amount of impacts and mitigation (Tables 1-4; Figures 1-8) showing location of Buffer impacts, Buffer mitigation, 8-digit HUC

Buffers

- The mitigation determination was overprotective
 - It overstates mitigation requirement because
 - Actual impacts are less under 404 Permit
 - FEIS failed to subtract wetlands acreage from mitigation requirement
 - Not an “admission” that DWQ must adopt in Certification
- Petitioners were not harmed by any technical violation and are not entitled to relief

[*See, e.g., Orange County v. N.C. Dep’t of Transp.*, 46 N.C. App. 350, 382, *rev. den.*, 301 N.C. 94 (1980)]

NHP/Rule 506(e)

Petitioners' claim:

401 Certification's authorization of any impacts to wetlands of “national significance” without a “public need” determination is unlawful

NHP/Rule 506(e)

Petitioners say:

“Before DWQ can authorize impacts to [wetlands of exceptional state or national ecological significance], the agency must not only evaluate standards applicable to all wetlands, it must also find that the impacts to these exceptional wetlands are ‘necessary for the proposed project to meet a demonstrated public need’...” [PTRF Br. p. 46 (selectively quoting 15A NCAC 2H.0506(e)]

NHP/Rule 506(e)

15A NCAC 2H.0506(e) actually states, in relevant part:

“(e) The Director shall issue a certification upon determining that significant existing uses are not removed or degraded by a discharge to wetlands of exceptional state or national ecological significance...provided that the wetlands have been so classified or designated prior to the date of application for certification or a draft environmental impact statement has been submitted to the Director...”

NHP/Rule 506(e)

Undisputed Record Evidence Shows:

- PCS original application submitted in 2000
- DEIS submitted in September 2006
- PCS revised application submitted either May 22, 2008 (FEIS notice) or June 6, 2008 (PCS letter)
- Any DWQ classification/designation occurred after DEIS and submission of the application
- First NHP classification/designation - Feb. 16, 2009 (even if satisfied Rule 506(e))

NHP/Rule 506(e)

Additional Bases to Reject Petitioners' Claim:

- DWQ has no authority to require avoidance pursuant to 401 Cert. as it is unrelated to water quality
- NHP has no authorization to classify
- Factually unsupported (Corps found not significant)
- Petitioners' assertions that PCS is challenging the 401 Certification are a red herring and estoppel arguments are baseless

NHP/Rule 506(e)

Summary:

Rule 506(e) is simply not applicable and there is no authority to require additional avoidance of impacts to the Bonnerton wet hardwoods forest area.

Petitioners arguments are meritless.

Alternatives Analysis

Petitioners' argue:

- (1) DWQ was required to undertake an alternatives analysis duplicative of the Corps' analysis.
- (2) The Project Purpose could have been met without mining south of Hwy 33.

Alternatives Analysis

- (1) DWQ used Corps' analysis (as required) and made its own analysis and assessment to make the alternatives determination.
[15A NCAC 2H.0506(i); DWQ Memo]

Alternatives Analysis

(2) Petitioners' S33 argument ignores the legal requirements of the alternatives analysis (40 CFR 1508.7, 1508.25), the Project Purpose, the DEIS, SDEIS, FEIS, and Petitioners' own position during the evaluation process.

Alternatives Analysis

40 C.F.R. § 1508.7 Cumulative Impact:

“Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions ... ”

Alternatives Analysis

40 C.F.R. § 1508.25 Scope:

“Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement ... They include:

(a) Actions ... which may be:

(2) Cumulative actions, which ... have cumulatively significant impacts and should therefore be discussed in the same impact statement.”

Alternatives Analysis

Affidavit of David Emmerling:

“9. In 1981 PTRF contacted the U.S. Corps of Army Engineers over a number of small wetland discharge permits the agency had issued to Tg. In its communications, PTRF called for an end to piece-meal wetland evaluation and destruction and encouraged a more comprehensive evaluation of the wetland and other environmental impacts of Tg’s phosphate mining activities. As a result, TG produced its first long-term mining plan in 1986.”

Notice

Petitioners' claim:

The December 2008 Certification required public notice if DWQ was considering modifying the certification, but DWQ did not provide proper notice prior to issuance of the Jan. 2009 Certification.

Notice

- It is undisputed that required notice was provided on May 22, 2008 - prior to issuance of the Dec. 2008 Certification.
- No additional notice of the Jan. 2009 Certification was required.
- Petitioners' argument is based on a misleading excerpt from condition 5 of the Dec. 2008 Certification.

Continuing Compliance:

5. PCS Phosphate Company, Inc. shall conduct construction activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act), the 401 Water Quality Certification rules (15A NCAC 2H .0500) and any other appropriate requirements of State law and federal law. If the Division determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, the Division may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC 2H .0507(d). Before modifying the Certification, the Division shall notify PCS Phosphate Company, Inc. and the US Army Corps of Engineers, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions shall be provided to PCS Phosphate Company, Inc. in writing, shall be provided to the United States Army Corps of Engineers for reference in any Permit issued pursuant to Section 404 of the Clean Water Act, and shall also become conditions of the 404 Permit for the project. This condition is intended to conform with the provisions of 15A NCAC 2H .0507 (d).

Notice

- No additional notice was required.
- Petitioners had additional notice and provided input, and therefore were not harmed.
- Petitioners are not entitled to any relief.

Conclusion

- Petitioners did not carry their burden to overcome the presumption the DWQ acted appropriately.
- The 401 Certification was issued in accord with all applicable requirements.
- The 401 Certification's approach has been upheld as a matter of law by the N.C. App.
- ALJ Decision should be upheld.